

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Ex Parte No. 586

***ARBITRATION -- VARIOUS MATTERS RELATING TO ITS USE AS AN EFFECTIVE
MEANS OF RESOLVING DISPUTES THAT ARE SUBJECT TO THE BOARD'S
JURISDICTION***

PETITION TO BROADEN INQUIRY

submitted by

THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

The National Industrial Transportation League ("League") respectfully submits this Petition, which strongly supports the Board's decision to initiate this proceeding, but also asks the Board to broaden its inquiry. The League believes that the Board is entirely correct to "encourage parties to resolve disputes, where possible, in a private, informal and less costly and burdensome way than the formal complaint process permits," through the use of arbitration of disputes that are subject to the Board's jurisdiction. See, Ex Parte No. 586 Decision served September 20, 2001, p. 2. The League also compliments the Board in attempting to assist Congress by providing a record on issues related to requiring, through legislation, arbitration of certain disputes that are within the Board's purview. However, the League believes that the Board has unnecessarily limited the scope of its inquiry, and should invite comments not only on the use of arbitration in small rail rate cases, but on other matters that are subject to the Board's jurisdiction. Such a broadened inquiry would provide a more useful record to the Congress should the legislature consider statutory changes that would elevate the use of arbitration in regulatory matters relating to rail carriers.



I. IDENTITY AND INTEREST OF THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

The National Industrial Transportation League is an organization of shippers that conduct industrial and/or commercial enterprises throughout the United States and internationally. The League is the oldest and largest nationwide organization representing shippers of all sizes of commodities. The League has approximately 600 separate company members, ranging from smaller shippers to some of the largest shippers in the country. The members of the League utilize all modes of transportation to move their goods in interstate, intrastate, and international commerce. Substantial volumes of commodities are shipped by League members via rail.

II. THE LEAGUE STRONGLY SUPPORTS THE BOARD'S INQUIRY

On September 20, 2001, the Board served a decision in this case that (1) asks all interested and qualified persons who wish to be placed on the Board's list of qualified arbitrators to notify the Board; (2) proposes to add a requirement to the Board's formal complaint procedures that would require a complainant to certify that it has considered arbitration; and, (3) initiates an inquiry into whether binding arbitration should be legislatively prescribed for small rail rate disputes and, if so, how such a requirement would work best. With respect to (3), the Board invited the public, through comments and accompanying analytical data, to examine a variety of issues raised in the Board's discussion.

The League commends the Board for initiating this proceeding. The League agrees that parties should be encouraged, where possible, to resolve disputes in a private, informal and less costly and burdensome manner than the Board's formal complaint process permits. Decision, p. 2. Arbitration of disputes, the League believes, could be a sound method of reducing the time and expense necessary to resolve disputes that may otherwise come before the Board, or that

may lie unresolved because of the time and expense of pursuing a formal dispute resolution process. The League also believes that the Board is properly and appropriately utilizing its offices to compile a record that might assist the Congress in evaluating whether changes might be considered related to requiring, through legislation, the arbitration of certain disputes subject to the Board's jurisdiction. A Board of Directors meeting of the League and a meeting of the League's Rail Transportation Committee are scheduled for November 13-15, 2001, and the subject of the Board's Notice of Inquiry in this proceeding will certainly be a topic of importance. The League looks forward to submitting its comments to the Board.

III. THE BOARD SHOULD BROADEN ITS PROPOSED INQUIRY TO INVITE COMMENTS ON OTHER TYPES OF DISPUTES THAT MIGHT BE RESOLVED THROUGH ARBITRATION

The League believes, however, that the Board has unnecessarily narrowed its inquiry, by appearing to limit comments to processes and procedures involved in arbitrating only so-called small rate cases. The League believes that the Board should issue an amended Notice that would invite comments on a broader range of disputes that might be subject to arbitration.

The overall title of the Board's September 20 Decision denotes an inquiry into arbitration as a means of resolving "disputes" that are subject to the Board's jurisdiction. However, a review of the Board's September 20 Decision reveals that the Board's inquiry is limited to a single type of dispute: a so-called "small rate case." The League agrees that it is entirely appropriate to solicit comments regarding the use of arbitration in small rate cases, and clearly the "small rate case" is one obvious candidate for the use of arbitration. However, there are many other types of disputes that might be resolved more quickly, more cheaply, and more easily through arbitration. The League believes that the Board should invite comments not only on issues relating to small

rail rate disputes, but should also solicit comments on other types of disputes that might be resolved through arbitration.

Even restricting an inquiry to issues that may arise between a single rail carrier and a single shipper, there are many disputes other than maximum reasonable rate disputes¹ that are subject to the Board's jurisdiction. These may include disputes as to:

- Reasonableness or applicability of rail classifications, rules and practices (49 U.S.C. §10702)
- Reasonableness or applicability of charges or allowances for the furnishing of a service or instrumentality (49 U.S.C. §10745)
- Demurrage (49 U.S.C. §10746)
- Provision of rail service on reasonable request (49 U.S.C. §11101)
- Provision of adequate car service and the reasonableness or applicability of rules and practices regarding car service (49 U.S.C. §11121)
- Liability under receipts and bills of lading (49 U.S.C. §11706)

By broadening its inquiry, the Board may provide substantial assistance to Congress by compiling a record as to shippers', railroads', and other interested parties' views as to the usefulness of arbitration as an effective means of resolving disputes in addition to small rate cases. As the Board notes, legislation presently pending before Congress regarding arbitration of matters under the Board's jurisdiction is broader than small rate cases. Decision, p. 9.

More importantly, there have already been agreements negotiated between shippers and carriers that deal with matters other than small rate cases. For example, as the Board noted in its

¹ Though the Board has focused on small rate cases, it might be useful to obtain information on the views of shippers as to the usefulness of arbitration even in large rate cases.

September 20 Decision, the National Grain and Feed Association ("NGFA") and the Association of American Railroads ("AAR") have negotiated an agreement to utilize arbitration for certain commodities in a variety of disputes. Such disputes include: application of a demurrage rule or term; misrouting of loaded rail cars or locomotives; disputes arising under receipts and bills of lading; application of a railroad's special car or equipment program rules; application of a railroad's general car distribution rules; mishandling of private cars; and others. See, Rail Arbitration Rules of the National Grain and Feed Association, adopted August 24, 1998.² The Board's own recently-published rules regarding rail mergers include a provision urging the offer of arbitration by merger applicants as part of their mandated service assurance plans. *Major Rail Consolidation Procedures*, decision served July 11, 2001, at 40-42, 66 Fed Reg. 32582 (June 145, 2001). The League itself entered into a recent settlement with the Canadian National Railway Company in the context of CN's proposed merger with the Wisconsin Central Railway Company, in which the League and the CN agreed that CN would arbitrate service disputes arising as a result of the merger. See, *Canadian National Railway Company, et al. - Control - Wisconsin Central Transportation Corporation, et al.*, served September 7, 2001, slip op. at 12. Thus, there is precedent on a national level for the use of arbitration in disputes other than those involving rates. Moreover, individual companies may have entered into voluntary arbitration arrangements with rail carriers on issues other than the level of rates, whose experience may be enlightening to the Board and to the Congress as it considers this matter. The League believes that the Board should examine all of these possibilities as it attempts to provide a record to Congress on the uses of arbitration, rather than simply looking at one possible narrow use of this potentially beneficial mechanism.

² <http://www.ngfa.org/traderules/2001%20Rail%20Arbitration%20Rules.pdf>

Under the Board's September 20 Decision, comments on the proposals and issues set forth in that Decision are due by November 23, 2001, or more than six weeks from now. If the Board would issue a decision broadening its inquiry by the end of October 2001, the present due date for comments could probably be retained. However, a modest extension of the current due date to permit a broader inquiry would not be harmful, since there is little possibility for legislative action until the Congress reconvenes after the new year in any event.


IV. Conclusion

The League respectfully requests the Board to issue an amended notice of inquiry, requesting, in addition to the topics set forth in the Board's September 20 Decision, comments regarding: (1) whether the use of arbitration is desirable for other types of disputes subject to Board jurisdiction in addition to those involving small rate cases; (2) if so, the types of disputes for which legislative change to utilize arbitration would be desirable; and, (3) the form that such arbitration should take and the extent of the arbitrator's authority.

Respectfully Submitted,

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